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IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

No. 587

IN THE MATTER OF
DIVERSEY HOTEL CORPORATION,
AN ILLINOIS CORPORATION,
DEBTOR.

ABRAHAM KOSDON, SAM HAUSLINGER AND
BENJAMIN LAPINE,
Petitioners,

vs.

DIVERSEY HOTEL CORPORATION,
Respondent.

MEMORANDUM IN OPPOSITION TO THE ISSUANCE OF A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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March 4, 1948.

THE BUNTHORP-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

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OPINIONS OF THE COURTS BELOW.

There was no opinion rendered by the Honorable Judge Campbell at the time of the entry of the Order appealed from on June 10, 1947. The opinion of the Circuit Court of Appeals is not yet reported and is printed in the Record at pages 104 to 109.

JURISDICTION.

The jurisdiction of this court is invoked under Judicial Code Section 240(a), 28 U.S.C.A. 547(a), as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED.

There is only one issue raised in this case, namely

"Was the petition filed in good faith pursuant to Section 130 (1 to 8) of Chapter X of the Bankruptcy Act?"

STATEMENT OF THE CASE.

On May 29, 1947, the DIVERSEY HOTEL CORPORATION, an Illinois corporation, filed a voluntary petition to reorganize under Chapter X of the Bankruptcy Act. There was no prior proceeding for reorganization pending in any court of any state or of the United States. All bondholders in the case, except the appellants, joined in the prayer of the petition. An order was entered by the Honorable Judge Campbell on June 10, 1947, finding the petition for reorganization to be filed in good faith and appointing a Trustee for the Debtor. This decision was affirmed unanimously by the Circuit Court of Appeals for the Seventh Circuit on January 21, 1948 (R. 104-109).

The Debtor owns a large office building and hotel located at Diversey and Broadway in Chicago. In 1932 there was issued and outstanding against this property first mortgage bonds amounting to $1,387,500.00 (R. 5). The bondholders at that time organized the Diversey Hotel Corporation, a Delaware corporation, for the purpose of acquiring and did acquire this property through foreclosure in the Superior Court of Cook County (R. 80).

A committee (George W. Pearson acted as Chairman) was organized and each bondholder was given a new first mortgage bond for his old bond (R. 80). The new bonds were 15 year income bonds maturing June 1, 1947. All of the stock of the new company was held by the committee for the benefit of the bondholders pursuant to the following authority (R. 81):

> "The Committee representing the bondholders will have authority to distribute the stock of the Company pro rata among the bondholders or to sell the stock

and apply the proceeds to the retirement of bonds, or to distribute such proceeds, pro rata, among the bondholders. Any stock held at the date of maturity of the bonds will be distributed pro rata amongst the then holders of such bonds."

Each bond bears the following legend (R. 62):

"In accordance with the plan of March 22, 1932, pursuant to which plan this bond was issued, at the time of issuance of this bond all of the capital stock of the Diversey Hotel Corporation was retained by a committee acting for the benefit of the holder of this bond and the holders of all other bonds secured by the Trust Indenture referred to in the within bond. At such time as the Committee holding such stock shall distribute the same the then registered owner of this bond shall be entitled to receive his pro rata share thereof."

In 1938, the Diversey Hotel Corporation, an Illinois corporation, was organized for the purpose of superseding the Delaware corporation of the same name. The Illinois corporation acquired all of the assets of the Delaware corporation, agreed to carry out the terms and provisions of the trust deed dated June 1, 1932, and assumed and agreed to pay the bonds of $1,387,500.00 (R. 86). There was issued 100 shares of stock to George W. Pearson who was the Chairman of the committee (R. 82). Interest from 1½% to 3% was paid on all bonds from 1938 to 1940 and thereafter 4% was paid to (but not including) June 1, 1947 (Supl. R. 1-7).

From time to time, the officers of the corporation attempted to sell the property. In August of 1946, they received a bid of $1,200,000.00 but were unable to accept it because the Chicago Real Estate Board appraised the property at $1,350,000.00 (R. 86). Under the terms of the trust deed dated June 1, 1932, no bid could be accepted

unless the bid was at least equal to the appraised value and this requirement was binding on the Continental Illinois National Bank & Trust Co., the indenture trustee, even though not less than 80% of the bondholders might approve a sale. The provisions pertaining to a sale of the properties are Sections 2, 3 and 4 on Pages 52-54 of the Trust Deed dated June 1, 1932, and read as follows:

"SECTION 2. Provided the Company shall not be in default hereunder to the knowledge of the Trustee,

(1) The Trustee shall release any part of the mortgaged property (but not the mortgaged property as a whole) from the lien of this Indenture, upon receipt by the Trustee of the following:

(a) A certificate signed by the President or a Vice President of the Company, describing the property which the Company desires to have released from the lien of this Indenture, stating that the Company has sold or entered into a contract for the sale of such property, the name and address of the purchaser, the terms and conditions of sale and the price for which the property has been sold or contracted to be sold.

(b) A copy of a resolution of the Board of Directors of the Company, certified by its Secretary under the corporate seal, authorizing the sale of such property upon the terms and conditions and for the price specified in the certificate referred to in the foregoing subparagraph (a) and requesting release of such property from the lien of this Indenture.

(c) A certificate of an appraiser satisfactory to the Trustee, certifying that he has appraised the property to be sold and that in his opinion such property does not have a fair market value in excess of the price specified in the certificate mentioned in the foregoing subparagraph (a) and that in his opin-

ion such price fairly represents the then value of such property.

(d) Cash or a certified check drawn upon a solvent banking institution to the order of the Trustee in an amount equal to the sale price of the property specified in the certificate referred to in the foregoing subparagraph (a), less such portion thereof, if any, as shall properly be payable to the trustee under the first mortgage.

(2) The Trustee shall release the mortgaged property as a whole from the lien of this Indenture upon receipt by the Trustee of the documents and cash or certified check required under subparagraph (a), (b), (c) and (d) of subdivision (1) of this Section 2, and, in addition thereto, written consents in form satisfactory to the Trustee, signed by the registered holders of not less than eighty per cent (80%) in principal amount of the bonds then outstanding consenting to the sale referred to in such documents and to the release of the mortgaged property from the lien of this Indenture.

SECTION 3. Upon any release by the Trustee of any part of the mortgaged property under the provisions of Section 2, Subdivision (1) of this Article, all cash paid to or deposited with the Trustee upon such release, after prior payment of all charges and expenses of the Trustee, shall become part of the sinking fund provided for in Article V hereof, and shall be applied to the retirement of bonds as provided in said Article V.

SECTION 4. Upon the release of the mortgaged property as a whole, as provided in Section 2, Subdivision (2) of this Article, all cash paid to or deposited with the Trustee upon such release shall, after prior payment of all charges and expenses of the Trustee, be distributed pro rata to the registered holders of the bonds, up to but not in excess of the principal amount

of the bonds outstanding plus interest thereon at the rate of six per cent per annum from June 1, 1932, to the last day of the calendar month preceding the month in which such distribution shall be made, less all interest theretofore paid on such bonds, upon surrender of their bonds to the Trustee for cancellation; and whenever the entire mortgaged property shall have been released from the lien of this Indenture as above provided, all of the outstanding bonds issued hereunder shall be deemed to have been fully paid, discharged and satisfied, and the rights of the holders thereof shall be limited solely to the right to receive a proportionate share of the moneys deposited with the Trustee, after prior payment of its charges and expenses as aforesaid, upon surrender of their respective bonds to the Trustee. Whenever such release shall have been effected, the Trustee shall mail a notice to each registered holder of bonds, addressed to him at his address as shown by the records of the Registrar, notifying such holder of the sale of the mortgaged property and release thereof from the lien of this Indenture, and advising such holder that upon presentation and surrender of his bond or bonds to the Trustee, he will be entitled to receive his pro rata share of the proceeds of such sale, after prior payment of all charges and expenses of the Trustee, as hereinabove in this Section provided. Any surplus of such proceeds remaining in the hands of the Trustee after all sums payable to the bondholders as aforesaid shall have been paid or set aside for payment shall be paid over to the Company."

Throughout the year of 1946 and winter and spring of 1947, the officers of the corporation continued their efforts to sell the properties (R. 90). Advertisements were placed in the leading daily newspapers of Chicago for this purpose (Exhibit C of Appellants' Answer, R. 23). But they were unable to make a sale. One of the appellants, Abraham Kosdon, appeared at a meeting of the board of di-

rectors held on April 22, 1947, for the purpose of inquiring about the purchase of the property. He talked about making a bid of $1,350,000.00, but this remained only in the talking stage. He said he did not have the earnest money (Supl. R. 15). Kosdon talked about making a deposit of $15,000.00 on a bid for the property and admitted that a $15,000.00 deposit on a bid of $1,350,000.00 would be an unfair deposit (Supl. R. 16). Kosdon discussed purchasing the building from the corporation for $1,350,000.00 (Supl. R. 15, 18), and was told that such a transaction would create an income tax payable by the corporation amounting to approximately $150,000.00 to $200,000.00 (Supl. R. 19). This, of course, would reduce the distribution to the bondholders by the same amount. Kosdon would not make a bid for the purchase of the stock of the corporation "simply because you would find yourself in another problem. I know there will be legal complications." (Supl. R. 24).

The officers and the corporation's attorneys considered and then abandoned as impracticable various plans to extend the maturity date of the bonds (R. 86-97).

The bonds of $1,387,500.00 became due June 1, 1947; the petition was filed May 29, 1947, and among other things alleged that the corporation was unable to pay its debts as they matured and prayed for the usual relief under Chapter X.

The answer of the appellants admitted the insolvency of the Debtor (R. 12) and that some sort of reorganization was necessary (R. 14).

ARGUMENT.

I.

THE DECISION OF THE CIRCUIT COURT OF APPEALS DOES NOT CONFLICT WITH ANY DECISION OF THIS COURT OR OF ANY OTHER CIRCUIT COURT OF APPEALS.

Appellants allege in effect that the decision rendered by the District Court on June 10, 1947, and affirmed by the Circuit Court of Appeals on January 21, 1948, conflicts with two groups of cases: those construing Section 146 (3) of the Bankruptcy Act, 11 U. S. C. A. 546(3) and those interpreting Section 146(4) of the Bankruptcy Act, 11 U. S. C. A. 546(4).

(A) The Decision in This Case Does Not Conflict With Those Cases Interpreting Section 146(4) of the Bankruptcy Act Holding That Where There Is a Prior Proceeding Pending in a State Court the Petitioner Must Prove That the Interests of the Debtor Would Not Be Better Served in That Prior Proceeding.

Appellants rely mainly upon the decisions of this court in *Marine Harbor Properties, Inc.* v. *Manufacturers Trust Co.*, 317 U. S. 78, 87 L. Ed. 64 (1942), and *Fidelity Assurance Society* v. *Sims*, 318 U. S. 608, 87 L. Ed. 1032 (1943).

The decision in the *Marine Harbor Properties* case not only does not conflict with the decision in this case, but rather, in its dicta, emphasizes the soundness of this decision. The only issue in that case was whether the Circuit Court of Appeals had been in error in holding that a Debtor's petition was not filed in good faith where a prior proceeding for foreclosure had been pending in the state

courts of New York for over six months and where the Debtor had not offered any proof that the interest of the bondholders and stockholders would not be better subserved in that state court proceeding. The court said (p. 85):

> "When a prior proceeding is pending a petitioner's showing of 'need for relief' under Chapter X, required to be contained in every petition by the express provisions of 130(7), must demonstrate that at least in some substantial particular the prior proceeding withheld or denied creditors or stockholders benefits, advantages, or protection which Chapter X affords. In the absence of such a showing the need for relief has not been established."

In the case at bar no prior proceeding was pending as was properly alleged in the petition (R. 6). Thus this case is entirely inapposite as the only issue in the case at bar was whether the good faith provision of Section 144 of the Bankruptcy Act, 11 U. S. C. A. 544, had been met.

In *Fidelity Assurance Society* v. *Sims,* 318 U. S. 608, 87 L. Ed. 1032 (1943), there was a prior proceeding pending; this was also true of the case *In re St. Charles Hotel,* 149 F. (2d) 645 (C. C. A. 3d, 1945) where the Circuit Court of Appeals, in a *per curiam* opinion, merely asserted that the District Court had not been in error in denying a petition to reorganize under Chapter X where there were prior proceedings pending and the Debtor had not alleged that the interest of the bondholders would not be better subserved in that proceeding.

In *In re Biltmore Grand Apartment Building Trust,* 146 F. (2d) 81 (C. C. A. 7th, 1944), cited by appellants on Page 6 of their brief, there was a state court proceeding pending and the Circuit Court of Appeals merely affirmed the dismissal of the petition by the lower court, saying at p. 83:

> "A petition shall be deemed not to be filed in good

faith if a prior proceeding is pending in any court and it appears that the interest of creditors and stockholders would be best subserved in such prior proceedings."

(B) The Decision Does Not Conflict With Those Cases Interpreting Section 146(3) of the Bankruptcy Act and Which Hold That Where it Is Unreasonable to Expect That a Plan of Reorganization Can Be Effected the Petition Should Be Denied as Not Filed in Good Faith.

Section 146 of the Bankruptcy Act reads as follows:

"Without limiting the generalities of the meaning of the term 'good faith,' a petition shall be deemed not to be filed in good faith if—(3) it is unreasonable to expect that a plan of reorganization can be effected;"

In *Fidelity Assurance Society* v. *Sims*, 318 U. S. 608, 87 L. Ed. 1032 (1943), the debtor had been insolvent for many years and for immediately two years prior to the filing of the petition had been losing money heavily with little prospect of any change ever taking place. There also were suits pending in various state courts for appointment of receivers for its assets. The court held that in these circumstances it was reasonable for the Circuit Court of Appeals for the 4th Circuit to have found that there was no reasonable likelihood of an effective reorganization taking place; that all that reasonably could be expected was a liquidation.

In the case at bar the corporation was not insolvent in the bankruptcy sense, but was only unable to meet its debts as they matured (R. 5). The Record shows that for eight years the bondholders have been receiving 4% on their investment and that for ten years have been receiving interest (Supl. R. 1-7) and that annual gross rentals are over

$216,000.00, according to appellants' own Exhibit C (R. 23), which is over fifteen per cent of the total indebtedness and that the Chicago Real Estate Board appraised the property at $1,350,000.00, which in itself is only $37,500.00 less than the total bonded indebtedness of $1,387,500.00.

Thus we see that the situation of the Debtor is in no sense hopeless and that reorganization can effectively take place. As stated by the Honorable Judge Evans in the opinion below (R. 106),

"Their hopes are brighter today than ever."

In *San Francisco Laundry Ass'n* v. *American Trust Co.*, 127 F. (2d) 187 (C. C. A. 9th, 1942), cited by appellants on page 26 of their brief, there was a specific finding by a Special Master after hearing evidence and by the District Court that the Debtor was insolvent in the bankruptcy sense and that there was no reason to believe that a reorganization could take place. The court said at p. 188:

> "The finding has ample support in the record. In the light of the finding and the admitted situation otherwise, it is plain that the debtor is insolvent in the bankruptcy sense; and that there is no reason to expect that a reorganization can be effected. Hence the proceeding was not instituted in good faith, Sec. 146 (3) of the Act, 11 U. S. C. A. 546 (3), and the dismissal was proper, Sec. 144, 11 U. S. C. A. Sec. 544."

Thus this case clearly follows within the rule of *Fidelity Assurance Society* v. *Sims*, 318 U. S. 608, 87 L. Ed. 1032 (1943), and in no way conflicts with the decision in our case.

The cases of *In re V. Loewer's Gambrinus Brewing Co., Inc.*, 141 F. (2d) 747 (C. C. A. 2d, 1944), cited by appellants on pages 6 and 24; *Country Life Apartments, Inc.* v. *Buckley*, 145 F. (2d) 935 (C. C. A. 2d, 1944), cited in appellants' brief on pp. 6 and 24; and *In re Lorraine Castle Apartments Bldg. Corp.*, 149 F. (2d) 55 (C. C. A. 7th, 1945),

cited by appellants on pages 6 and 25, all involve appeals from orders approving Plans of Reorganization. None of them involve an appeal from the granting of a petition. Rather than support appellants' view, they support the view of the Appellee as the Plan which was approved by the lower court, whose decision was affirmed in *In re Lorraine Castle Apartments Bldg. Corp.*, 149 F. (2d) 55 (C. C. A. 7th, 1945), involved the sale of all the assets of the debtor by which payments of one hundred cents on the dollar, plus interest, were made to all bondholders, which is very similar to the situation at bar as here the appellants are contending that the likelihood of such a Plan prevents the petition from being filed in good faith.

In both *In re Loewer's Gambrinus Brewing Co., Inc.*, 141 F. (2d) 747 (C. C. A. 2d, 1944), and *Country Life Apartments, Inc.* v. *Buckley*, 145 F. (2d) 935 (C. C. A. 2d, 1945), the court affirmed orders of the District Court for the sale of all the assets of the Debtor. In the latter case the court said at p. 938:

> "Here when the petition was filed it did not appear that the debtor had no chance for reorganization or that reorganization would not be a reasonable method of serving the best interests of creditors and stockholders."

In *In re Loewer's Gambrinus Brewing Co., Inc.*, 141 F. (2d) 747 (C. C. A. 2d, 1944), Judge A. N. Hand speaking for the court, said (p. 749):

> "In the case at bar it was not apparent when the petition was filed that the debtor had no chance of adjusting the claims of its creditors and of ultimately resuming the operation of its rehabilitated brewery."

Thus, we submit that no case cited by the appellants in any wise conflicts with the decision of the Circuit Court of Appeals in the case at bar, and thus there are no grounds

for the issuance of a writ of certiorari because of any conflict with decisions of this court or of any other Circuit Court of Appeals.

II.

A WRIT OF CERTIORARI WILL NOT BE GRANTED TO REVIEW THE VERBIAGE OF A CIRCUIT COURT OF APPEALS OR TO REWRITE THE OPINION BUT ONLY TO REVIEW INCORRECT DECISIONS.

Reasons 2, 3 and 4 cited by the appellants for the issuance of the writ (Appellants' Petition, pp. 7-8), all deal with the dicta of the opinion in the Circuit Court of Appeals. They in no wise affect the decision of the court which was that the District Court was correct in finding that the petition met the statutory requirements of Sec. 130 of the Bankruptcy Act, 28 U. S. C. A. 530. Certiorari is granted to review incorrect decisions on legal questions, not to rewrite the opinion of the Circut Court of Appeals. Thus, we need not discuss them any further.

III.

UNSUPPORTED ALLEGATIONS OF FRAUD ARE NOT GROUNDS FOR THE ISSUANCE OF A WRIT OF CERTIORARI.

Pages 27 to 32 of appellants' brief in support of their petition, deal with allegations of fraud. The Record is barren of a scintilla of evidence of fraud. Mere allegations of fraud do not give jurisdiction. The words themselves, unsupported by facts, are mere vituperations. In *First National Bank* v. *Bryn Mawr Bldg. Corp.*, 365 Ill. 409 (1937), the court said at p. 430:

> "Counsel for appellants throughout their brief use strong language in charging fraud. Fraud is a charge easy to make, particularly under the protection of court proceedings."

And in *Ashton* v. *MacQueen*, 361 Ill. 132 (1935), the court said at p. 143:

> "No citation of authority is necessary to support the statement that fraud is not presumed, and statements by way of general conclusions of fraud are not sufficient in a pleading."

And in *Doose* v. *Doose*, 300 Ill. 134 (1921):

> "An allegation of conspiracy, collusion and fraud must show the facts upon which it is based. The words themselves, unsupported by facts are mere vituperations."

Also see *Felt* v. *U. S. Mortgage and Trust Co.*, 231 Ill. App. 110 (1923); *Haskell* v. *Art Institute of Chicago*, 304 Ill. App. 393 (1940); *Dickinson* v. *Dickinson*, 305 Ill. 521 (1922).

Fraud is also a question of fact and an error in the decision of a question of fact is not adequate grounds for the issuance of a writ of certiorari.

IV.

A WRIT OF CERTIORARI SHOULD NOT BE ISSUED TO REVIEW THE QUESTION OF MERGER.

(A) Merger Is a Question of Fact.

Whether a merger has taken place or not is not a question of law but a question of fact depending upon all the facts, including all the surrounding circumstances of the individual case and the decision will not be altered by a reviewing court if any evidence supports the decision of the lower court.

(B) There Was No Merger.

Mergers are not favored in the law. *Clark* v. *Glos,* 180 Ill. 556 (1899): "Mergers are not favored either in courts of law or in equity." *Wechter* v. *Chicago Title and Trust Co.,* 385 Ill. 111 (1944).

Merger is a question of fact depending upon the intent of the party or parties owning the equity of property and mortgage at the same time. *Factors and Traders Insurance Co.* v. *Murphy,* 111 U. S. 138, 38 L. Ed. 582 (1884), where this court said (p. 144):

> "The question is always upon the intention, actual or presumed, of the person in whom the interests are united."

This is the law in Illinois. *Richardson* v. *Hockenhull,* 85 Ill. 124 (1877); *Security Title and Trust Co.* v. *Schlender,* 190 Ill. 609 (1901); *Moffet* v. *Farwell,* 222 Ill. 543 (1906); *Edgar County Bldg. and Loan Assn.* v. *Cablin,* 268 Ill. App. 125 (1932); *Hooper* v. *Goldstein,* 336 Ill. 125 (1929), where the court said at p. 133:

> "But a merger is not a necessary result of the union of the two estates of the same person. The intention and interest of the party who unites the two estates in himself will determine whether or not a merger takes place."

In its latest pronouncement on the subject, the Illinois court said, *Chicago Title and Trust Co.* v. *Wolchinovesky,* 326 Ill. App. 194, 200 (1945):

> "On the question of merger, it is well settled in this state that merger is a question of intention, and that no merger of a lesser estate will result unless there is shown that the party who owns the two estates actually intended that a merger should result."

This is the law in general. *Shreve* v. *Harvey,* 74 N. J. Eq. 336 (1908); *Commercial Merchants National Bank and*

Trust Co. of Peoria v. *LeTourneau*, 137 F. (2d) 87 (C. C. A. 7th, 1943), *cert. denied* 320 U. S. 778, 64 S. Ct. 93, 88 L. Ed. 469 (1943); 2 Jones on Mortgages, Sec. 1080, Page 509; 2 Pomeroy's Equity Jurisprudence (4th Ed.), Sec. 791; Wiltsie on Mortgage Foreclosure (4th Ed.), Sec. 264, Page 364.

It is therefore clear that no merger of the stock and lien securing the bonds took place by operation of law and certainly there has been no expressed intent on the part of the bondholders to effectuate merger. If there is any intent on the part of the bondholders, it is to the contrary and against the theory of merger. The bondholders created a corporation and had their stock held in the name of a trustee, to be voted in their behalf for approximately 15 years. There is nothing to indicate that they intended to have the corporation considered non-existent at any time. On the contrary, all bondholders who intervened in this case, with the sole exception of appellants, filed answers praying that an order be entered finding the petition to be filed in good faith. This alone indicates an intention against merger—an intention to continue the legal entity of the corporation. Even appellants did not, prior to their oral argument before the Circuit Court of Appeals, at any times allege that there was a merger, but have contended that the bondholders should be relegated to their rights to foreclose in the state courts, thereby also indicating an intention against merger.

There is also a further obstacle to merger in the case at bar. In order to effectuate a merger here it is necessary to disregard the corporate entity. Courts of equity will only disregard the corporate entity in exceptional cases—only where it is being used to perpetrate a palpable injustice. *In re Commonwealth Light and Power Co.*, 86 F. (2d) 474 (C. C. A. 7th, 1936); *In re John Koke Co.*, 38 F.

(2d) 232 (C. C. A. 9th, 1930); *Kingston Dry Dock Co.* v. *Lake Champlain Transp. Co.*, 31 F. (2d) 265 (C. C. A. 2d, 1929); *Owl Fumigating Corporation* v. *California Cyanide Co.*, 24 F. (2d) 718 (D. Del., 1928); *Boatmans' Bank* v. *Gillespie*, 209 Mo. 127 (1908); *Berkey* v. *Third Avenue Railway Co.*, 244 N. Y. 84 (1926), (Opinion by Mr. Justice Cardozo).

In *In re John Koke Co.*, 38 F. (2d) 232, 233 (1930), the court said:

> "The rule is quite elementary that a corporation is an entity separate and distinct from its stockholders, with separate rights and liabilities; and this is true even though a single individual may own all, or nearly all, of the capital stock."

Illinois decisions so holding, include *McDermott* v. *A. B. C. Burner Sales Corp.*, 266 Ill. App. 115 (1932); *Illinois Interior Finish Co.* v. *Poenie*, 277 Ill. App. 554 (1934), and *Wollenberger* v. *Hoover*, 346 Ill. 511 (1931), where the court said at p. 575:

> "A stockholder, though he owns 99% of the corporation, is not the corporation and is not the owner of the property of the corporation."

Thus we see that in order for this court to adopt the merger theory, it would be compelled to ignore the legal entity of the corporation which it would do only to redress fraud or otherwise prevent a grave injustice. There has been no showing of fraud in this case and if anyone needs protection it is the bondholders, which can be best accomplished by permitting them to reorganize the Debtor under Chapter X.

Conclusion.

We have shown that the decision of the District Court which was unanimously affirmed by the Circuit Court of Appeals does not conflict with any decision of this court or of any other Circuit Court of Appeals; that there was no evidence of any fraud; that there was no merger of the stock and bonds; and that the other grounds alleged for issuance of a writ of certiorari are without substance. Therefore, the Diversey Hotel Corporation, an Illinois Corporation, Debtor Appellee, prays that the petition for a writ of certiorari to review the decision of the Circuit Court of Appeals for the Seventh Circuit, be denied.

Respectfully submitted,

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